No. 89-516

In The

Supreme Court of the United States

October Term, 1989

WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the courts below correctly determined that resentencing petitioner to death pursuant to a procedural statute, which became effective after petitioner's first sentencing proceeding but before his original death sentence was set aside, violated neither the *ex post facto* nor equal protection clauses of the Constitution.

II. Whether the courts below, in rejecting petitioner's claim of prosecutorial misconduct, correctly applied 28 U.S.C. § 2254(d) to the state courts' findings that the Commonwealth had acted in good faith.

III. Whether the courts below correctly determined that petitioner was not entitled to federal habeas relief on the basis of a claim that he was denied the effective assistance of counsel during the direct appeal of his original death sentence which was vacated more than six years ago.

IV. Whether the courts below correctly rejected petitioner's claim that due process required the trial court to instruct the jury that if it could not agree upon the issue of punishment the court would automatically impose a life sentence.

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JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari

at SA-1 and 2, and in the appendix to this brief in opposition at 1a-2a.[1]

STATEMENT OF THE CASE

On April 17, 1981, a jury in the Circuit Court of the City of Alexandria, Virginia, convicted the petitioner, Wilbert Lee Evans, of capital murder. After a separate hearing on the issue of punishment, the same jury recommended the death penalty. On June 1, 1981, the Circuit Court imposed the death penalty in accordance with the jury's verdict. The conviction and death sentence were affirmed by the Supreme Court of Virginia on December 4, 1981. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981) (*Evans I*). This Court denied a petition for a writ of certiorari on March 22, 1982. 455 U.S. 1038 (1982).

Petitioner initiated state habeas corpus proceedings in April, 1982. He amended his habeas petition on two occasions, the second in late December, 1982. The Commonwealth confessed error in the petitioner's sentencing proceeding on April 12, 1983, and on May 2, 1983, the Circuit Court of the City of Alexandria entered an order setting aside Evans' death sentence. On September 21, 1983, the Circuit Court conducted an evidentiary hearing to determine whether Evans should be resentenced or his sentence reduced to a life term. By an order dated October 12, 1983, the Circuit Court directed that Evans be resentenced.

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[1] References to the Petition for Writ of Certiorari will hereafter be designated "(Ptn. ___)." References to the petitioner's appendix will be designated "(App. ___)." And references to the appendix to this brief in opposition will be designated "(A. ___)."

On January 30, 1984, the Circuit Court impaneled a new jury for a resentencing hearing, and at the conclusion of that proceeding the jury recommended the death penalty. On March 7, 1984, the Circuit Court imposed the death penalty in accordance with the jury's verdict. The Supreme Court of Virginia affirmed Evans' death sentence on November 30, 1984. *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (*Evans II*). This Court again denied certiorari. 471 U.S. 1025 (1985).

On May 14, 1985, Evans reinitiated state habeas corpus proceedings. An evidentiary hearing was conducted in the Circuit Court of the City of Alexandria on December 16, 1985, and Evans' habeas petition was dismissed in its entirety by an order dated June 3, 1986. Evans' petition for appeal to the Virginia Supreme Court was refused in an order dated February 26, 1987. This Court denied certiorari a third time on June 22, 1987. 483 U.S. 1010 (1987).

Evans filed his federal habeas petition in the United States District Court for the Eastern District of Virginia on October 5, 1987. On November 17, 1987, he filed a motion under Rule 6, Rules Governing § 2254 Cases, requesting discovery of the Commonwealth's files. In that motion, Evans alleged that the files contained evidence which would support his claim of prosecutorial misconduct. The Commonwealth opposed the motion, but agreed to an *in camera* review of the files by the District Court. On April 12, 1988, after conducting such a review and finding no support whatsoever for Evans' allegation, Judge Robert R. Merhige, Jr. denied the discovery motion. On August 4, 1988, in a lengthy written opinion, Judge Merhige carefully considered and rejected each of Evans' claims. (App. 17a-28a).

The United States Court of Appeals for the Fourth Circuit unanimously affirmed Judge Merhige's decision on August 2, 1989. *Evans v. Thompson*, 881 F.2d 117 (4th

Cir. 1989). (App. 2a-16a). Evans petitioned for a rehearing en banc, but not a single judge on the entire Fourth Circuit voted to rehear the case. (App. 1a).

STATEMENT OF FACTS

On January 27, 1981, the petitioner, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. Evans had pretended to be a willing witness for the Commonwealth, but his sole purpose in cooperating with the authorities had been to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he acted on this intent when he killed the victim. (App. 3a).

The evidence at his resentencing hearing revealed that Evans had a significant prior history of violent criminal conduct. The jury's imposition of the death penalty was based upon a finding of the petitioner's "future dangerousness."[2] *See* Va. Code § 19.2-264.2. (Ptn. at SA-1).

REASONS FOR DENYING THE WRIT

Preliminary Statement

All of the claims which Evans has raised in his present petition have previously been presented to this Court. In 1985, after the Virginia Supreme Court had affirmed his resentencing on direct appeal, Evans brought his *ex post facto*, equal protection, and due process claims

[2] Evans' reference to events outside the record which allegedly occurred after his resentencing trial (Ptn. 9 n.7, 29 n.40) are not only improper but are manifestly irrelevant to the issues raised in his petition.

to this Court. (See Questions Presented Nos. 1-3 in *Evans v. Commonwealth*, No. 84-1224). In that same proceeding, in the context of his equal protection claim, Evans also raised his allegation of prosecutorial misconduct. (See Evans' petition in No. 84-1224 at 6, 16-20). Evans' attempt to persuade this Court to review his claims was unsuccessful. And in 1987, after the conclusion of his state habeas proceedings, Evans failed in his effort to have this Court review his claim that he was denied the effective assistance of counsel during the direct appeal of his original death sentence. (See Question Presented No. 1 in *Evans v. Commonwealth*, No. 86-1754).

In the aftermath of Evans' prior petitions, the very same claims which he raised then have been exhaustively litigated and meticulously reviewed by the courts below. The District Court Judge in this case, the Honorable Robert R. Merhige, Jr., rejected all of Evans' claims and his opinion contains not even a hint of constitutional error in petitioner's case.[3] (App. 17a-28a). In a similar manner, the Fourth Circuit carefully analyzed and unanimously rejected Evans' claims. (App. 2a-16a). Moreover, when Evans petitioned for rehearing, not a single member of the Fourth Circuit voted to rehear the case. (App. 1a). Under these circumstances, there is even less reason now for this Court to grant certiorari review than there was when the Court denied Evans' prior petitions.

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[3] Judge Merhige is a jurist whose special concern for petitioners facing death sentences cannot be doubted. Indeed, it was Judge Merhige who fashioned the "right to counsel" during state habeas proceedings for Virginia death row inmates which was the subject of controversy in *Murray v. Giarratano*, ___ U.S. ___, 109 S.Ct. 2765 (1989). It was no doubt because of Judge Merhige's reputation that Evans filed his federal habeas petition in Richmond, where Judge Merhige presides, rather than in Alexandria where the petition normally would have been filed.

I. THE COURTS BELOW CORRECTLY REJECTED EVANS' *EX POST FACTO* AND EQUAL PROTECTION CLAIMS.

A. No *ex post facto* violation

At the time of petitioner's offense, and at the time of his first sentencing proceeding, Virginia Code § 19.2-264.3 provided that in a capital murder jury trial the sentencing proceeding must be conducted before the same jury which determined the defendant's guilt. The Supreme Court of Virginia announced such an interpretation of § 19.2-264.3 in *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). At the time Evans' original death sentence was vacated, however, and at the time of his resentencing proceeding, § 19.2-264.3 had been amended to provide that if a death sentence were "set aside or found invalid," a resentencing proceeding could be held before "a different jury" than the one which had determined the defendant's guilt. Petitioner contends that the application of the amended version of § 19.2-264.3 to his case constitutes an *ex post facto* violation.

In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court held:

> Critical to relief under the *Ex Post Facto* Clause *is not an individual's right to less punishment*, but the lack of fair notice and governmental restraint when the legislature increases punishment *beyond what was prescribed when the crime was committed.*

450 U.S. at 30 (emphasis added). And in *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court recognized that the proper focus of an *ex post facto* analysis is "the quantum of punishment attached to the crime" at the time of the offense. 432 U.S. at 294. The Court also made it quite clear that if the change in a particular law is either "procedural" or "ameliorative" there can be no *ex post facto*

violation. 432 U.S. at 292, n.6, *citing Beazell v. Ohio*, 269 U.S. 167 (1925).

In *Miller v. Florida*, 482 U.S. 423 (1987), this Court concluded that "even if a law operates to a defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.' " 482 U.S. at 433, *quoting Dobbert* 432 U.S. at 293. Under *Miller*, "no *ex post facto* violation occurs if the change in the law is merely procedural and does not 'increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " 482 U.S. at 433, *quoting Hopt v. Utah*, 110 U.S. 574, 590 (1884). The Fourth Circuit and the District Court meticulously analyzed Evans' claim under this Court's precedents and correctly concluded that the claim must fail. (App. 5a-8a, 20a-22a).

As the Virginia Supreme Court found in *Evans II*, petitioner "had notice at the time of the offense" as to "the quantum of punishment attached to the crime," and the change in § 19.2-264.3 was merely an "adjustment in the method of administering that punishment that [was] collateral to the punishment itself." 228 Va. at 476-477, 323 S.E.2d at 119. The Fourth Circuit and the District Court reached the same conclusion. (App. 6a, 21a). In no sense can it be reasonably said that the amendment of § 19.2-264.3 increased the punishment attached to Evans' offense "beyond what was prescribed when the crime was consummated." *See Miller*, 482 U.S. at 430, *quoting Weaver*, 450 U.S. at 30.

With respect to whether the change in the law at issue here was "procedural," this case cannot be distinguished from *Dobbert v. Florida* in any meaningful way. In *Dobbert* a defendant, who had been sentenced to death by the trial judge despite the jury's recommendation of a life sentence, argued that a change in Florida law had

deprived him of a "substantial right to have the jury determine, without review by the trial judge, whether the death penalty should be imposed." 432 U.S. at 292. This Court rejected that argument and ruled that such a "change in the role of the judge and jury in the imposition of a death sentence" was merely procedural, and therefore applying the new law to *Dobbert* did not constitute an *ex post facto* violation. *Id.*

As in *Dobbert*, the change in the law in Evans' case was merely procedural in that its only effect was to alter the procedures surrounding the imposition of the death penalty and did not increase the quantum of punishment attached to Evans' crime. At the time of his offense, Evans had no more of a "substantial right" to a life sentence if or when his death sentence was ever set aside, or to a sentencing by the same jury which had convicted him, than *Dobbert* had a "substantial right" to have a jury impose sentence without the intervention of a trial judge. In both cases, " 'the crime for which the . . . defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.' " *Miller*, 482 U.S. at 435, *quoting Dobbert* 432 U.S. at 294.[4]

The courts below also correctly concluded that Evans' reliance upon *Kring v. Missouri*, 107 U.S. 221

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[4] Since the change in Virginia law was clearly "procedural," no *ex post facto* violation could be found even if the change had not been "ameliorative." *See Dobbert* 432 U.S. at 292, n.6. The Fourth Circuit, however, agreed with the Virginia Supreme Court that the change was also ameliorative because its purpose was to protect a defendant's right "to a fair and impartial determination of his punishment" by a jury "free of any taint arising from errors during the first trial." (App. 8a, *quoting Evans II*, 228 Va. at 477, 323 S.E.2d at 119).

(1883), is misplaced. (App. 7a, 21a-22a). At the time of the offense in *Kring*, the rule in Missouri was that if a person were convicted of second-degree murder, he was thereby forever acquitted of first-degree murder. 107 U.S. at 223. Prior to Kring's trial, the Missouri Constitution was amended so that if the conviction of a person who had pleaded guilty to second-degree murder were reversed, that person could be convicted of first-degree murder upon retrial. 107 U.S. at 224. Upon a plea of guilty, Kring was convicted of second-degree murder and was sentenced to twenty-five years in prison. He appealed, however, on the basis of a breached plea agreement and his conviction was reversed. Upon retrial, Kring was convicted of first-degree murder and sentenced to death. 107 U.S. at 221. This Court ruled in *Kring* that applying the new law to the defendant rather than the law in effect at the time of his offense violated the *ex post facto* clause. 107 U.S. at 235-236.

Evans' case, however, is readily distinguishable from *Kring*.[5] The Court's primary concern in *Kring* was articulated as follows:

> The case rests then upon the proposition that, having an erroneous sentence rendered against him . . . by the court, [Kring] could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death *for another and different offense of which he stood acquitted* by the judgment of that court.

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[5] When Evans brought his *ex post facto* claim to this Court in 1985, he implicitly acknowledged that *Kring* is inapposite. A review of his 1985 petition and reply brief (No. 84-1224) reveals that *Kring* was not even cited as authority for his claim even though he had relied upon *Kring* in the Virginia Supreme Court on direct appeal. *See Evans II*, 228 Va. at 477, 323 S.E.2d at 119.

107 U.S. at 235 (emphasis added). Unlike the defendant in *Kring*, Evans has never been convicted of a lesser offense for which the death penalty is not an authorized punishment, nor has he ever been acquitted of any offense for which the death penalty is authorized. And unlike the situation in *Kring*, Evans "hazarded" nothing in terms of a greater offense or punishment by seeking to overturn his original death sentence.

In *Hopt v. Utah*, this Court explained *Kring* in the following manner:

> By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.

Hopt, 110 U.S. at 589. Thus, as the Fourth Circuit found (App. 7a), *Kring* stands for the rather unremarkable proposition that if, at the time of the offense, a defendant is on notice that if he commits a certain offense (second-degree murder) he can *never* be subjected to a death sentence, imposition of a death sentence after conviction for that offense violates the *ex post facto* clause. Evans, however, has always been on notice that death was a permissible punishment for his offense. *See* Va. Code §§ 18.2-31(f) and 18.2-10(a). (A. 1a).

The Virginia Supreme Court, the District Court, and the Fourth Circuit have all analyzed Evans' claim under the proper standard and all have concluded that there has been no *ex post facto* violation. The petitioner has failed to show any circumstances which would warrant the granting of certiorari.[6]

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[6] Evans' attempt to show a "conflict" among the federal circuits has no basis in fact. (Ptn. 10 n.9). In *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989) (en banc), the Ninth Circuit expressly stated, "Because we decide this case on due process grounds, rather than under the *ex post facto* clause as in *Dobbert*, we do not reach Coleman's *ex post facto* argument." 874 F.2d at 1286 n.7. Thus, *Coleman v. McCormick* certainly cannot form the basis for an argument that there is a split among the circuits concerning the proper application of *Dobbert*. To the contrary, the Fourth Circuit's decision in Evans' case is consistent with the decisions of every other circuit which has applied *Dobbert* to similar *ex post facto* claims. *See Coleman v. Saffle*, 869 F.2d 1377, 1385-1387 (10th Cir. 1989) (rejecting *ex post facto* claim where under old law petitioner's death sentence would have automatically been reduced to life sentence if jury found erroneous mitigating circumstance). *See also Jordan v. Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982); *Knapp v. Cardwell*, 667 F.2d 1253, 1262-1263 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982) (rejecting *ex post facto* claim where petitioner claimed right to life sentence under state law). Evans' reliance upon several state cases (Ptn. 11 n.9) is equally unsuccessful. *Thigpen v. Thigpen*, 541 So.2d 465 (Ala. 1989), does not purport to decide a federal *ex post facto* claim, but rather, expressly states that resentencing Thigpen "would indisputably violate § 7" of the Alabama Constitution. 541 So.2d at 467. Similarly, the express basis for the decision in *State v. Rodgers*, 242 S.E.2d 215 (S.C. 1978), was *not* the *ex post facto* clause, but rather, the court's conclusion that the state legislature had not intended the new statute to be applied to defendants who were tried before the statute's effective date. 242 S.E.2d at 218. *Meller v. State*, 581 P.2d 3 (Nev. 1978), does not even mention the *ex post facto* clause,

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B. No equal protection violation

The essence of Evans' equal protection claim is his allegation that he and the defendant in *Patterson v. Commonwealth* were "similarly situated," and yet, the Virginia Supreme Court applied the original version of § 19.2-264.3 to Patterson's case and commuted his death sentence to a life sentence, while the Court applied the amended version of the statute to Evans' case and affirmed the reimposition of his death sentence.[7] The courts below, however, carefully analyzed the claim and rejected it for the same reason it had been rejected on direct appeal by the Supreme Court of Virginia: the classification at issue in this case is rationally related to the purpose of the statutory amendment.

In *Evans II*, the Virginia Supreme Court found that the purpose of the amendment to § 19.2-264.3 was merely

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and Evans concedes that the lower appellate court ruling in *State v. Creekpaum*, 732 P.2d 557 (Alaska App. 1987), has been overruled by the Alaska Supreme Court. 753 P.2d 1139 (1988). Thus, none of the state cases Evans has cited can support his "conflict" argument. To the contrary, all of the state courts which have decided a federal *ex post facto* issue similar to Evans', have, like the Virginia Supreme Court, applied *Dobbert* and found no violation. *See, e.g., Cartwright v. State*, 778 P.2d 479 (Okla. Crim. App. 1989), *overruling Dutton v. Dixon*, 757 P.2d 376 (Okla. Cr. App. 1988); *Klasing v. State*, 771 S.W.2d 684, 686-687 (Tex. App. 1989); *Pickens v. State*, 730 S.W.2d 230, 234-235 (Ark. 1987); *State v. Norton*, 675 P.2d 577, 585-588 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984).

[7] To the extent Evans is merely alleging that state law, *i.e.* the *Patterson* decision, was misapplied in his case, such a claim is clearly insufficient to constitute a denial of equal protection. *See generally Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) (mere error of state law not basis for federal habeas relief).

to change "the procedure to be followed if a death sentence is set aside. . . ." 228 Va. at 482, 323 S.E.2d at 122. Both the Fourth Circuit and the District Court agreed that this was the purpose of the amendment. (App. 9a, 25a). Prior to the statutory change, any jury sentencing in a capital case had to be done by the same jury which had convicted the defendant of capital murder. *Patterson*, 222 Va. at 660, 283 S.E.2d at 216. The Court ruled in *Evans II*, however, that Evans and Patterson were "not similarly situated . . . with respect to the amendment to the death penalty statutes." 228 Va. at 481, 323 S.E.2d at 122. The Court's basis for this conclusion was the fact that Evans' death sentence had been set aside *after* the effective date of the statutory amendment, whereas Patterson's death sentence was judicially invalidated before the effective date of the amendment. 228 Va. at 482, 323 S.E.2d at 122.

Thus, the effect of the Court's decision in *Evans II* was to create two classes with respect to the applicability of § 19.2-264.3: those capital defendants whose death sentences were set aside prior to the effective date of the statutory change; and those capital defendants, like Evans, whose death sentences were set aside and whose resentencing proceedings commenced after that date. Under *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), this classification must be presumed valid and must be sustained if it is rationally related to a legitimate governmental objective. And, as both courts below correctly noted (App. 9a, 25a), the "rational basis" test must be applied in the context of the particular objective of the legislation in question. *See Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

Every judge and every court which has reviewed Evans' claim has found that the classification at issue is rational. The Virginia Supreme Court found that "[b]ecause the . . . statutory change affects only the procedure to be followed if a death sentence is set aside, [it

is] more rational to classify individuals potentially affected by the change according to the time when the individual's death sentence was set aside . . . rather than at the time the person was originally tried and convicted." *Evans II*, 228 Va. at 482, 323 S.E.2d at 122. Judge Merhige concluded that the amendment "is a procedural change, and it is rational that its application be tied to the event which necessitates a resentencing procedure: vacating the original sentence." (App. 25a). And the Fourth Circuit found that "to apply the amendment only to those defendants whose sentences were vacated following the amendment's enactment is entirely rational." (App. 9a). When such a wide spectrum of courts and judges has unanimously agreed that the classification is rational, it is pointless for Evans to persist in his allegation that the rational basis test has not been satisfied. Indeed, this broad consensus of judicial opinion strongly militates against the exercise of this Court's certiorari power.

Both courts below correctly concluded (App. 9a, 25a) that Evans' case could not be reasonably distinguished from *Dobbert* where this Court found "nothing irrational" about Florida's decision to apply an amended death penalty statute to the petitioner in that case. 432 U.S. at 301. Evans has attempted to distinguish *Dobbert* by emphasizing that in rejecting Dobbert's equal protection claim this Court noted that "the new statute was in effect at the time of his trial and sentence," 432 U.S. at 301, and he points out that unlike the situation in *Dobbert*, the amended statute which was applied to him was not passed until "two years after [his] trial, and more than a year after his death sentence had become final." (Ptn. 17). This "distinction," however, ignores the obvious fact that in *Dobbert* a new procedural statute was permitted to govern the proceedings, *i.e.* Dobbert's "trial and sentence," which occurred after the effective date of the new law. Similarly, in Evans' case the new procedural statute has been permitted to govern the proceeding, *i.e.* the resentencing

trial, which was conducted after the amendment became effective. Thus, the type of a "line-drawing" done by the Virginia Supreme Court in Evans' case is the same type of "line-drawing" approved by this Court in *Dobbert*.[8]

The two state cases relied upon by Evans, *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981), and *Lee v. State*, 340 So.2d 474 (Fla. 1976), afford him no relief. As previously noted, whether any two given sets of defendants are "similarly situated" for equal protection purposes must be determined by reference to the purpose of the particular law to be applied. Both *Story* and *Lee* involved situations, unlike Evans' case, where the purpose behind the new statutes in question was to enact a constitutional death penalty statute to replace one which had been declared unconstitutional. The defendants in those cases, unlike Evans and unlike the defendant in *Dobbert*, had been tried and convicted pursuant to an unconstitutional statute just like the other class of defendants referred to in those cases whose sentences had been commuted to life imprisonment. Thus, in both *Story* and *Lee*, improper distinctions had been drawn between sets of defendants who were indeed "similarly situated" with respect to the particular statutes in question. *See Story*,[9] 440 A.2d at 491; *Lee*, 340 So.2d at 475.

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[8] While "drawing the line" according to when a death sentence is vacated is conceivably susceptible to abuse by intentional manipulation, that is an entirely separate claim and Evans' allegation that the Commonwealth intentionally manipulated his case has been rejected by every court which has considered it. (See below at 16-19).

[9] *Story* is also distinguishable from Evans' case in that it was based upon a finding by the Supreme Court of Pennsylvania that "the Legislature did not intend the [new statute] to apply to an offense committed prior to its effective date." *See*

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Given the procedural purpose of the statute at issue in Evans' case, the Supreme Court of Virginia, the District Court, and the Fourth Circuit have all correctly concluded that Evans and the defendant in *Patterson* were not "similarly situated" for equal protection purposes. Neither *Story* nor *Lee* casts any doubt upon the correctness of that conclusion.

II. THE COURTS BELOW PROPERLY FOLLOWED THE MANDATE OF 28 U.S.C. § 2254(D) AND REJECTED EVANS' CLAIM OF PROSECUTORIAL MISCONDUCT.

Despite the fact that his claim has been rejected, in turn, by a Virginia trial court judge, the unanimous Supreme Court of Virginia, a federal district court judge, and now, the unanimous Fourth Circuit, Evans persists in his allegation that the Commonwealth of Virginia has been guilty of "pervasive, gross and admitted misconduct."[10] (Ptn. 2). The claim is entirely without merit.

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Commonwealth v. Crenshaw, 470 A.2d 451, 454 (Pa. 1983). *See also Story*, 440 A.2d at 489. Evans does not, and could not reasonably contend that the Virginia General Assembly did not intend for the amended version of § 19.2-264.3 to be applied to a case, like his, where the death sentence was invalidated *after* the effective date of the amendment. *See* Va. Code § 1-16 ("proceedings . . . shall conform, so far as practicable, to the laws in force at the time of such proceedings"). (A. 1a).

[10] Evans' petition is littered with mischaracterizations and half-truths. For example, Evans implies that the Commonwealth has admitted that it knowingly used false evidence. (Ptn. 2, 21-22). Nothing could be farther from the truth. The Commonwealth has consistently denied every allegation of bad faith or intentional error, and every court which has reviewed Evans' claim has decided the matter in the Commonwealth's favor. None of these courts has even suggested that the Commonwealth knowingly used false evidence.

When Judge Merhige was presented with Evans' claim, he concluded as follows:

> On September 21, 1983, the trial court conducted an extensive evidentiary hearing on Evans' claims of misconduct by the Commonwealth. The Court concluded with respect to the alleged misconduct by the trial prosecutors, that
>
> > the defendant has failed to prove to the satisfaction of the Court that the prosecution engaged in such misconduct or tactics as to warrant the Court in concluding that the Commonwealth is precluded from again seeking the death penalty.
>
> The trial court also found no purposeful or wrongful delay in the confession of error by the Commonwealth. Judge Wright ruled that the record did not show any tactical maneuvering by the Attorney General's Office with respect to the 1983 amendment. These findings were affirmed by the Virginia Supreme Court on direct appeal.[11] *Evans II*, 323 S.E.2d at 119-121.
>
> In making these factual findings, the trial court relied on an extensive evidentiary hearing and an *in camera* review of the original files of the Governor's Office and the Attorney General's Office relating to drafting, introduction, consideration, and approval of the 1983 amendment.

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[11] More specifically, the Supreme Court of Virginia found that "credible evidence supports the trial court's finding of fact" concerning the trial prosecutor, *Evans II*, 228 Va. at 478, 323 S.E.2d at 119, and that the trial court's finding that the Attorney General's Office had not deliberately delayed confessing error in Evans' case was supported by "credible, uncontradicted, and persuasive" evidence. 228 Va. at 479, 323 S.E.2d at 120.

> This Court has conducted a similar *in camera* review, and additionally has reviewed the Attorney General's file concerning Evans' original direct appeal. These records fail to provide any support for Evans' claim of prosecutorial misconduct.

(App. 23a-24a, footnote omitted). The Fourth Circuit also had no difficulty concluding that the state courts had made factual findings that the Commonwealth had acted in good faith. (App. 10a). Thus, the record belies Evans' assertion that the state courts "made no findings of fact at all." (Ptn. 19).

Both the District Court (App. 24a) and the Fourth Circuit (App. 10a) recognized that 28 U.S.C. § 2254(d) requires that the state courts' findings of fact be accorded a presumption of correctness. *See Sumner v. Mata*, 455 U.S. 591, 592 (1982). Both courts also found that the state courts' findings in this case are "fairly supported" by the evidence. (App. 10a, 24a). *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983).

The Commonwealth does not contend, and has never contended, that the fact that the petitioner's first death sentence was based, at least partially, upon evidence that was erroneous or misleading was a situation that did not demand a remedy. To the contrary, it was because of that defective evidence that the Commonwealth confessed error. The only remedy to which Evans was entitled under the Constitution, however, was a fair and impartial resentencing proceeding.

Even where the government is guilty of "deliberate" and "egregious" misconduct, an accused is not entitled to dismissal of the indictment in the absence of "demonstrable prejudice." *United States v. Morrison*, 449 U.S. 361, 365-367 (1981). Here, where the state courts have found that the Commonwealth acted in good faith, and those findings have been sustained by the courts below, there is

simply no constitutional basis for concluding that the error committed at Evans' original sentencing proceeding barred any subsequent imposition of a death sentence.[12] *See Arizona v. Youngblood*, ___ U.S. ___, 109 S.Ct. 333, 337 (1988); *United States v. Lovasco*, 431 U.S. 783, 790, 795-796 (1977); *United States v. Marion*, 404 U.S. 307, 325 (1971) (all three cases emphasizing petitioner's burden to show bad faith in order to sustain due process claim).

III. EVANS' CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON THE DIRECT APPEAL OF HIS ORIGINAL DEATH SENTENCE DOES NOT WARRANT CERTIORARI REVIEW.

Evans contends that he was denied the effective assistance of counsel when, in *Evans I*, his appellate attorneys failed to discover and bring to the attention of the Virginia Supreme Court the errors in the records of his prior convictions upon which his original death sentence was, at least in part, based.[13] While Evans contends that

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[12] By confessing error even though the error at the initial sentencing proceeding was unintentional, the Commonwealth recognized that, *with regard to the validity of the original death sentence*, the good or bad faith of the prosecutor was irrelevant. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963). The issue in this case, however, is not the validity of the original death sentence, but whether there was sufficient "misconduct" to bar a resentencing. For this reason, Evans is mistaken in asserting that the state courts' findings of good faith are "irrelevant" to the issue of whether a resentencing proceeding was barred. (Ptn. 21).

[13] To the extent Evans suggests that counsel were ineffective when they petitioned this Court for a writ of certiorari (Ptn. 23), the claim is entirely without merit. There is no constitutional right to counsel during such discretionary appeals, and consequently, no right to the effective assistance of counsel. *Ross v. Moffitt*, 417 U.S. 600, 617-618 (1974).

the lower courts' uniform rejection of his claim "eviscerates" his right to the effective assistance of counsel (Ptn. 22), he concedes that this Court has already "made plain" the standard of review which governs his claim and that the Fourth Circuit "recognized" the proper standard. (Ptn. 23). Thus, his argument that this Court "should grant certiorari to provide needed guidance concerning the proper application" of this standard (Ptn. 23) rings hollow. The mere fact that Evans disagrees with the way in which the standard was applied in his case is insufficient to warrant certiorari review.

The test in judging claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This two-part test requires a showing that counsel's performance was seriously deficient *and* that counsel's alleged errors resulted in actual prejudice. 466 U.S. at 687. The *Strickland* standard applies to claims against appellate counsel as well as to claims against trial counsel. *See Smith v. Murray*, 477 U.S. 527, 535-536 (1986).

The Fourth Circuit correctly applied this standard and found that Evans had failed both prongs of the *Strickland* test. (App. 14a-15a). As the court below correctly noted, counsel traveled to North Carolina prior to trial to investigate Evans' record of prior convictions. At that time the records in North Carolina were in a state of disarray. (App. 14a-15a). *See Evans II*, 228 Va. at 479, 323 S.E.2d at 120. Counsel objected to some of the records when they were introduced at trial. (App. 15a). After trial, counsel gleaned from the record Evans' most viable claims and raised them on appeal in the Virginia Supreme Court. (App. 15a). Evans' contention that counsel had an additional duty to go beyond the trial record and to raise on appeal a claim challenging the accuracy of Evans' record of prior convictions is simply untenable.

Appellate counsel had no duty to go outside the trial record because nothing beyond that record, even if it had

been discovered, would have been cognizable on appeal. It is beyond question that the "triple-certified" conviction records which were introduced at trial (A. 3a) could not have been proved to be erroneous without reference to matters outside the trial record, such as the affidavit that Evans' habeas counsel was unable to obtain until almost a year after Evans' state habeas petition was filed.[14] (A. 7a).

The Fourth Circuit, which is intimately familiar with Virginia law, recognized that in Virginia an appeal can only be decided upon matters of record. (App. 15a). "The Commonwealth and the defendant must stand or fall upon the case that was made in the lower court and reflected by the record under review. [The Virginia Supreme Court] is not a forum in which to make a new case." *Guthrie v. Commonwealth*, 212 Va. 602, 604, 186 S.E.2d 68, 70 (1972). *See also O'Dell v. Commonwealth*, 234 Va. 672, 696 n.8, 364 S.E.2d 491, 505 n.8, *cert. denied*, 109 S.Ct. 186 (1988) (rule applied in capital case). Indeed, this Court follows the very same rule. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970). Thus, Evans' underlying contention is antithetical to established principles of appellate practice. A failure by counsel to raise a non-cognizable matter on appeal simply cannot be the basis for a finding of deficient performance under the first prong of the *Strickland* test.[15]

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[14] Evans' contention (Ptn. 24-25) that an obscure reference to the word "nolle" in his post-sentence report (App. 43a) would have been sufficient to invalidate the triple-certified conviction records is ludicrous on its face. Moreover, any claim that counsel were ineffective in this regard *at trial* has long since been abandoned.

[15] The issue concerning the erroneous conviction records, of course, was properly raised and resolved during subsequent state collateral proceedings where the matter was fully cognizable. Indeed, under Virginia law, state habeas proceedings are

(Continued on following page)

Moreover, as both the District Court (App. 25a-26a) and the Fourth Circuit (App. 15a) concluded, Evans also failed to demonstrate *Strickland* prejudice. The claim which Evans contends his counsel should have raised on appeal related solely to a penalty-stage error, *i.e.* the admission of inaccurate conviction records. That error certainly entitled Evans to have "the slate wiped clean," but it did not guarantee that he could not be resentenced. *See Poland v. Arizona*, 476 U.S. 147, 152 (1986). The state courts have "wiped the slate clean" in this case by vacating Evans' original death sentence and by affording him an error-free resentencing proceeding. The Constitution entitled him to nothing more.

IV. THE COURTS BELOW CORRECTLY DETERMINED THAT DUE PROCESS DOES NOT REQUIRE THAT A CAPITAL SENTENCING JURY BE INSTRUCTED THAT IF IT IS UNABLE TO REACH A VERDICT THE TRIAL COURT WILL AUTOMATICALLY IMPOSE A LIFE SENTENCE.

Very shortly after retiring to deliberate at the petitioner's resentencing proceeding, the jury sent the trial judge the following question:

(Continued from previous page)

reserved solely for claims which could not have been litigated on appeal. *See Epperly v. Booker*, 235 Va. 35, 43, 366 S.E.2d 62, 66-67 (1988). Clearly, if on direct appeal Evans' attorneys had attempted to prove that the certified conviction records were inaccurate, the Commonwealth could have insisted that the matter be litigated in a habeas proceeding rather than on appeal.

> The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?[16]

After initially voicing the opinion that the jury should be told that its verdict must "be unanimous as to either penalty" and that the jury "must not concern [itself] with what may occur if [it is] unable to reach a verdict" (A. 5a), defense counsel reversed his position and requested the trial court to instruct the jurors that "if they cannot be unanimous on death, then it is life." The trial court denied counsel's request and instructed the jury that its "verdict must be unanimous as to either life imprisonment or death." (A. 5a).

On direct appeal, the Virginia Supreme Court held that the trial judge's instruction accurately reflected Virginia law. *See Evans II*, 228 Va. at 481, 323 S.E.2d at 121. Both the District Court (App. 27a) and the Fourth Circuit (App. 13a) concurred. Thus, Evans' argument is reduced to the preposterous assertion that the trial judge committed error of constitutional dimensions by accurately informing the jury that any verdict it reached must be unanimous and by refusing to tell the jurors, in effect, that they could avoid their joint responsibility to reach a verdict and thereby insure that Evans would receive a life sentence from the court.

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[16] Evans' rather strained assertion that the jury asked its question "in the heat of its deliberations" (Ptn. 27) is belied by the record. The jury first retired to the jury room at 1:05 p.m. (A. 4a). Shortly thereafter, the jury asked its question. After the issue was discussed among court and counsel, the court answered the question and then recessed the proceedings for lunch until 2:15 p.m. (A. 5a-6a). When the jury returned at 2:15, it recommenced its deliberations and did not return its verdict until shortly before 3:30 p.m. (A. 6a).

The courts below correctly rejected Evans' claim. This Court has recognized that, even in a capital case where the jury's inability to reach a verdict will result in an automatic life sentence, the State retains "a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.' " *See Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546, 551 (1988) (citation omitted). The instruction which Evans requested and which the trial judge refused could well have encouraged the jury to avoid its responsibility, thereby frustrating the Commonwealth's "strong interest" in having the jury determine Evans' sentence. Surely, due process did not require that the jury be given such an instruction.

Evans' reliance upon *State v. Williams*, 392 So.2d 619 (La. 1980), is misplaced. If the decision in *Williams* has any validity whatsoever, it would be limited to those instances, unlike Evans' case, where the jury has been deliberating a lengthy period of time before the question is asked and has announced to the court that it is deadlocked. *See Williams*, 392 So.2d at 639-640 (Lemon, J., concurring). In Evans' case the record provides no evidence of deadlock and clearly shows that the jury had been in the jury room only a short time before the question was asked. (A. 4a-5a).

Also misplaced is Evans' reliance upon another Louisiana case, *State v. Loyd*, 459 So.2d 498 (La. 1984). Although in *Loyd* there was no evidence of deadlock before the question was asked, the Louisiana court found evidence of judicial coercion in the fact that the jury had been deliberating for an hour before the question was asked and that it returned its verdict only eighteen minutes after the judge answered the question. 459 So.2d at 503. In Evans' case, there is not the slightest hint of coercion. After the trial judge answered the question, the jury went to lunch and then returned to deliberate for

more than an hour before it sentenced Evans to death.[17] (A. 5a-6a).

Both the District Court (App. 28a) and the Fourth Circuit (App. 13a) correctly rejected Evans' claim that the trial court's instruction had "misled" the jury about its role at a capital sentencing proceeding. Both courts below also properly rejected Evans' assertion that *Mills v. Maryland*, ___ U.S. ___, 108 S.Ct. 1860 (1988), required a different conclusion.

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[17] Evans' contention that this Court should grant certiorari because the Fourth Circuit's rejection of his claim "squarely conflicts with the decisions of the highest courts of two other states" (Ptn. 26) is meritless. As previously shown, the Louisiana cases are clearly distinguishable on their facts. Moreover, there is no conflict with *State v. Ramseur*, 524 A.2d 188 (N.J. 1987). Contrary to Evans' assertion (Ptn. 26 n.34), *Ramseur* was expressly decided on non-constitutional grounds. *See* 524 A.2d at 282 ("we rest our decision on our state-law supervisory power over the administration of criminal justice"). And, as Evans concedes (Ptn. 26 n.34), the panel decision in *United States v. Arpan*, 861 F.2d 1073 (8th Cir. 1988), has been vacated. *See* 867 F.2d 1188 (8th Cir. 1989). Thus, Evans' "conflict" argument for granting certiorari is left totally without support. Various state courts have rejected, as Virginia's courts have done, the claim that a capital sentencing jury must be instructed that a life sentence will be imposed if it cannot reach a verdict. *See, e.g., People v. Kimble*, 749 P.2d 803, 822-825 (Cal.), *cert. denied*, 109 S.Ct. 188 (1988); *Johnson v. State*, 731 P.2d 993, 1005 (Okla. Cr. App.), *cert. denied*, 484 U.S. 878 (1987); *Calhoun v. State*, 468 A.2d 45, 59-60 (Md. 1983); *State v. Copeland*, 300 S.E.2d 63, 70-71 (S.C. 1982), *cert. denied*, 460 U.S. 1103 (1983); *Coulter v. State*, 438 So.2d 336, 346 (Ala. Cr. App. 1982); *State v. Smith*, 292 S.E.2d 264, 276 (N.C.), *cert. denied*, 459 U.S. 1056 (1982); *Houston v. State*, 593 S.W.2d 267, 278 (Tenn. 1980); *Jones v. State*, 281 So.2d 983, 992 (Miss.), *cert. denied*, 449 U.S. 1003 (1980); *Dick v. State*, 273 S.E.2d 124, 131 (Ga. 1980), *cert. denied*, 451 U.S. 976 (1981).

Mills is inapplicable unless there is a "substantial probability" that the jury was misled into believing that a death sentence was, in some sense, mandatory, or that the jury was precluded from considering evidence in mitigation. 108 S.Ct. at 1870. When a Virginia jury receives penalty-stage instructions such as those that were given in this case, there is no danger that a jury could conclude that a death sentence is mandatory. *See, e.g., Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir.), *cert. denied*, 108 S.Ct. 1459 (1988).

Nor is there any merit to Evans' claim that the trial court's instruction could have misled individual jurors into believing that he or she was powerless to effect a life sentence. The trial court's answer to the jury's question must be viewed " 'in its context and under all the circumstances.' " *See Lowenfield*, 108 S.Ct. at 550 (citation omitted). As the Fourth Circuit so aptly stated:

> [T]he trial judge's response to the jury's inquiry left no doubt that a non-unanimous verdict could not result in death.***The jury was simply told that any verdict must be reached unanimously. During *voir dire*, moreover, each juror was informed that even as a minority of one, he or she could hold out if convinced that a life sentence was appropriate. At closing, defense counsel reminded the jury that their sentence must be unanimous.[18] Finally, when polled individually, each juror affirmed the verdict as his or her own.

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[18] Defense counsel was permitted to remind the jury that its decision was "irrevocable" and to argue that "they cannot take . . . Evans' life unless you unanimously, every one of you, all twelve of you say death penalty." Counsel also reminded the jurors of their "promise" during voir dire to "stick by your

(Continued on following page)

(App. 13a). Under these circumstances, there is simply no factual basis for a conclusion that Evans' jury was in any sense misled by the trial court's instruction.

CONCLUSION

This is the fourth occasion on which Evans has asked this Court to review his case. Just as the Court has done on each of the three prior occasions, certiorari review should be denied.

As petitioner admitted when last before this Court, his case is extraordinarily fact-bound. (See Evans' petition in No. 86-1754 at 3; "extraordinary confluence of events"). Evans made a similar concession in the Fourth Circuit. (See Evans' reply brief at 15 n.23; "the unique factual circumstances in this case will seldom be repeated"). Thus, the issues raised by Evans are unlikely to recur, and his case will have little, if any, impact beyond the parameters of its own facts. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955); *Lane & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). *See also Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (" 'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.' ").

Moreover, this case has been scrupulously reviewed for constitutional error, not only by the state courts, but also by Judge Merhige and by a unanimous Court of Appeals. No such error has ever been found.

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conviction [even] if a vote was taken and you were in the minority." (A. 3a-4a). And, as the District Court noted, each and every juror had sworn during voir dire "to vote according to his own conclusions." (App. 28a).

Thus, Evans has clearly failed to demonstrate any "special or important" reason why this case should be reviewed on certiorari. *See* U.S. Sup.Ct.R. 17.1. For these reasons, the petition should be denied.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

*DONALD R. CURRY
Senior Assistant Attorney General

*Counsel of Record

October 26, 1989

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

Va. Code § 1-16 (in relevant part):

> **Repeal not to effect liabilities; mitigation of punishment.** – No new law shall be construed to repeal a former law. . . .save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .

Va. Code § 18.2-10(a) (in relevant part):

> **Punishment for conviction of felony.** – The authorized punishments for conviction of a felony are:
>
> (a) For Class 1 felonies, death, or imprisonment for life.

Va. Code § 18.2-31(f) (in relevant part):

> **Capital murder defined; punishment.** – The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> * * *
>
> (f) The willful, deliberate and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties;

28 U.S.C. § 2254(d) (in relevant part):

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless. . . .

* * *

(8) . . . the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

TRIAL TRANSCRIPT PAGE 582 (excerpt)

THE COURT: Except for the certification of the clerk which states the foregoing and a copy of the indictment, the warrant and the judgment and the commitment and it makes reference to 96.8. The clerk has certified this is the indictment that corresponds to 96.8.

Given that certification, notwithstanding the fact that the indictment does not have a number on it, I'm satisfied as to its admissibility.

MR. LONG: I object to it.

THE COURT: All right, sir. Make that the next number if you will, please.

THE CLERK: Twenty-one.

THE COURT: All right.

(The document previously referred to was marked Commonwealth's Exhibit No. 21 for identification.)

TRIAL TRANSCRIPT DATED 9-21-83 PAGE 46 (excerpt)

[Referring to Commonwealth's Exhibit 21]

MR. KLOCH: . . . First of all, we had some difficulty getting it from North Carolina. It was a triple certified document. I hesitate to even touch let alone fold and recopy them, because there have been numerous objections, even if there's a staple removed, that something has been changed.

RESENTENCING TRANSCRIPT DATED 2-3-84 (excerpts)

PAGE 38:

[DEFENSE COUNSEL]: And I respectfully hope that in your deliberations you want to make the right

decision. You want to make the right decision because your decision on death is irrevocable, they cannot take Lee Evans' life unless you unanimously, every one of you, all twelve of you say death penalty. Don't make a mistake.

PAGES 51-52:

[DEFENSE COUNSEL]: You made Lee Evans and myself a promise the first day of these deliberations and that is when you went back to the jury room you would come to grips with yourself, your own thoughts, your sense of fairness, your sense of justice, you would make up your minds individually and collectively, because you are going to discuss this case and the instructions of the Court. But once you made a decision, that you would stick by that decision, you would stick by your conviction. And if a vote was taken and you were in the minority, that you would not yield, you would stand by your convictions. I just remind you of that and ask you humbly to stick by your convictions, don't waver. If you believe this man deserves life, don't waver. Stick to your guns.

PAGES 61-62:

THE COURT: The jury may retire to consider its verdict.

(Whereupon, the jury retired to the jury room.)

THE COURT: The Court will recess to await the verdict of the jury.

(Whereupon, a recess was taken.) (1:05 p.m.)

THE COURT: Gentlemen, I have received a question from the jury and I wanted to give you a chance to express your thoughts as to how I should respond before I brought the jury back in to answer the question. The

question reads as follows, "The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?"

* * *

THE COURT: I just looked at [the statute]. It says if the jury is unable to reach a verdict, the Court imposes a sentence of life. But I don't think I should tell the jury that. I think I should tell the jury, your verdict must be unanimous as to either penalty and you must not concern yourself with what may occur if you are unable to reach a verdict, because it has to be unanimous to return a life verdict as well.

[DEFENSE COUNSEL]: Your Honor, we respectfully agree that that would be the appropriate instruction.

PAGES 66-67:

THE COURT: Ladies and gentlemen, I have your question which reads as follows, "The decision must be unanimous for death. Must the decision also be unanimous for life, or does a split decision automatically become life?"

You are instructed that your verdict must be unanimous as to either life imprisonment or death.

You may resume your deliberations. Do you want to go to lunch sometime soon? . . . What is your preference?

THE JURORS: Lunch.

THE COURT: All right. We will recess until 2:15.

* * *

The Court will recess until 2:15.

(Whereupon the jury was temporarily excused for luncheon recess.)

THE COURT: All right. Gentlemen, we will recess then until 2:15.

(Whereupon, the proceedings were recessed, to convene at 2:15 o'clock p.m.)

PAGES 72-73:

THE COURT: The record will reflect that the defendant and his counsel were present at all stages of the trial and the defendant was capably represented.

The defendant will be remanded to the custody of the Sheriff.

The Court will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:30 o'clock p.m., the proceedings were concluded.)

AFFIDAVIT

RUSSELL NIPPER, being first duly sworn, deposes and says as follows:

1. My name is Russell Nipper. I am now, and for some time have been both the Clerk of the Superior Court for Wake County, North Carolina, and of the District Court for Wake County, North Carolina. In those capacities, I have in my custody and control all the records of these courts.

2. At the request of Jonathan Shapiro, attorney for Wilbert Evans, and Jerry Slonaker, Assistant Attorney General for the Commonwealth of Virginia, I had occasion to thoroughly check the files of both the District Court and the Superior Court concerning several cases in which Wilbert Lee Evans was a defendant. Specifically, I was asked to determine the following information:

* * *

3-22-83.

[signed Russell Nipper]
Russell Nipper
Clerk of the District and
Superior Courts

Sworn to and subscribed
before me this the 22nd day
of March, 1983.

*[signed by Vickie U.
Rumsden]*
Notary Public